

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Digital Broadcast Copy Protection	)	MB Docket No. 02-230
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	)	

**COMMENTS OF  
OFFICE OF THE COMMISSIONER OF BASEBALL,  
NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL HOCKEY LEAGUE,  
NATIONAL FOOTBALL LEAGUE,  
WOMEN'S NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PGA TOUR, INC. and  
LADIES PROFESSIONAL GOLF ASSOCIATION**

Philip R. Hochberg  
Paul W. Jamieson  
Piper Rudnick LLP  
1200 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036  
(202) 861-3900

*Counsel for National Basketball Association,  
National Hockey League, National Football  
League, Women's National Basketball  
Association, National Collegiate Athletic  
Association, PGA TOUR, Inc. and  
Ladies Professional Golf Association*

Of Counsel

Robert Alan Garrett  
Christopher Winters  
Arnold & Porter  
555 Twelfth Street, N.W  
Washington, D.C. 20004  
(202) 942-5000

*Counsel for the Office of the Commissioner  
of Baseball*

Thomas J. Ostertag  
Senior Vice President and General Counsel  
Office of the Commissioner of Baseball  
245 Park Avenue  
New York, NY 10167  
(212) 931-7800

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The Office of the Commissioner of Baseball, the National Basketball Association, the National Hockey League, the National Football League, the Women's National Basketball Association, the National Collegiate Athletic Association, the PGA TOUR, Inc. and the Ladies Professional Golf Association (collectively, "Professional and Collegiate Sports") respectfully submit these comments in response to the Further Notice of Proposed Rulemaking in the above-referenced docket,<sup>1</sup> which seeks comment on a number of issues related to implementation of the Broadcast Flag regime adopted by the Commission in the Order.

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<sup>1</sup> *In the Matter of Digital Broadcast Copy Protection, Report and Order and Further Notice of Proposed Rulemaking*, MB Docket No. 02-230, FCC 03-273 (released Nov. 4, 2003) (the "Order" and the "Further Notice," respectively).

As Congress has instructed, and as the Commission itself has recognized, the Commission has no authority to alter copyright law through the Broadcast Flag. The scope of the Flag and the PDNE therefore must be consistent with the very limited rights of consumers to redistribute protected works under existing copyright law. Content owners may voluntarily and affirmatively waive such rights in certain contexts, but they should not be forced to waive their rights under copyright law as a condition of making their copyrighted programming available over digital broadcast television.

## **II. THE FCC MAY NOT ALTER THE SCOPE OF COPYRIGHT LAW BY SANCTIONING TECHNOLOGIES THAT ALLOW WIDESPREAD INFRINGEMENT.**

### **A. The FCC May Not Limit Copyright Owners' Rights in Protected Works.**

Well before the release of the Order, the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property held a hearing on the Broadcast Flag during which members of Congress were explicit about the limits of the Commission's jurisdiction in the Broadcast Flag proceeding with respect to copyright owners' rights in protected works.<sup>5</sup> Media Bureau Chief Kenneth Ferree acknowledged the limits of the Commission's jurisdiction at this hearing.<sup>6</sup> In the Order, the Commission's awareness of its limited jurisdiction<sup>7</sup> was explicit that the scope of the

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<sup>5</sup> Statement of Subcommittee Chair Lamar Smith, Piracy Prevention and the Broadcast Flag, House Judiciary Committee, Subcommittee on Courts, the Internet and Intellectual Property, March 6, 2003 (the "House Hearing") ("When it comes to transmission, that is one thing. When it comes to use, that is another, and I hope the FCC will respect our jurisdiction in that regard."). See also statement of Subcommittee Ranking Minority Member Howard Berman ("I am unaware of any precedent for the FCC interpreting the Copyright Act as part of an FCC rulemaking or in any other capacity, nor am I aware, for that matter, of the FCC ever mandating that copyright owners surrender any of their exclusive rights to consumers. . . . I am opposed to the FCC attempting to interpret, regulate or otherwise limit the exclusive rights of copyright owners in the course of its broadcast flag.").

<sup>6</sup> House Hearing transcript at 17 (testimony of Media Bureau Chief Ferree that "we have no desire to duplicate the work of the Copyright Office").

<sup>7</sup> Professional and Collegiate Sports clarify that references herein to the limitations on the Commission's authority and jurisdiction do not bear on the Commission's authority to adopt rules to limit redistribution of digital broadcast

“personal environment” of any redistribution control system must be “consistent with copyright law.”<sup>8</sup> There can be no reasonable disagreement over the fact that whatever steps the Commission takes, it must operate within the boundaries of copyright law.

**B. Existing Law Only Allows Consumers to Time-Shift Broadcast Television Programming for Personal Use.**

Certain parties have filed comments addressing copyright law’s application to the Broadcast Flag. Unfortunately, many of these comments have misstated the law by suggesting that copyright law, and, in particular, the fair use doctrine, would permit expansive use by consumers of digital broadcast content. To the contrary, as the Copyright Office itself has made clear in its testimony on fair use, the Broadcast Flag may not allow for the kind of redistribution that many consumer interests have advocated.<sup>9</sup> Fair use simply does not support a limited scope for the Flag and an expansive definition of a PDNE. The broad rights to redistribute digital broadcast content claimed by consumer groups are not supported by the law. Rather, existing law only permits copying of broadcast content in order to allow consumers to time-shift programming for personal use.

Early in this proceeding, the Register of Copyrights addressed claims that existing copyright law would permit liberal use of digital broadcast content without infringing on content owners’ rights in those works. Specifically, in her testimony at the House Hearing, Register of Copyrights Marybeth Peters expressed concern about comments filed in this proceeding urging

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*(footnote continued from previous page)*

television signals under its ancillary authority under Title I of the Communications Act and its plenary authority over broadcast transmission. The comments herein go only to the Commission’s authority with respect to copyright law.

<sup>8</sup> Order at ¶ 10.

<sup>9</sup> House Hearing transcript at 9-14 (testimony of Marybeth Peters, Register of Copyrights on limitations of fair use).

the FCC to allow “broad uses of copyrighted works [to] be accommodated within the broadcast flag”<sup>10</sup> through the fair use doctrine. Many such comments, Ms. Peters explained, are “predicated on various interpretations and applications of the 1984 Supreme Court’s 5-4 decision in *Sony Corporation v. Universal Studios*.”<sup>11</sup> Ms. Peters described the limits of that holding with respect to the fair use defense in the context of digital broadcast content.

The Court held [in *Sony*] that making reproductions of free over-the-air television programs for the purposes of time-shifting . . . is a fair use. That finding was largely based on the Court’s analysis of the fourth factor in Section 107 [of the Copyright Act], namely whether time-shifting adversely affects the market for or value of the copyrighted works at issue. . . . Due to the nature of today’s technologies, application of fair use to digital broadcasts would be significantly different than the *Sony* analysis.<sup>12</sup>

The fundamental differences between analog and digital television – that digital content may be replicated perfectly, in perpetuity, and redistributed to a virtually unlimited number of recipients – calls for a much more limited application of fair use. As Professional and Collegiate Sports and others have explained in this proceeding,<sup>13</sup> widespread redistribution of live and tape delayed sporting events (and even short excerpts of sports content such as those in highlight shows) would have a severely negative effect on the market for Professional and Collegiate Sports’ products.

As the Register of Copyrights has correctly recognized, the *Sony* decision only extends the fair use defense to time-shifting of analog broadcast programming. Copyright owners may

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<sup>10</sup> House Hearing transcript at 9.

<sup>11</sup> *Id.*, citing *Sony Corp. of America v. Universal Studios*, 416 U.S. 417 (1984).

<sup>12</sup> House Hearing transcript at 13. Perhaps even more importantly, Ms. Peters explained what the Court in *Sony* did not hold. *Id.* at 13-14 (internal footnotes omitted) (“The Court did not consider whether other activity related to home taping of broadcasts – such as creating a library of recorded shows, making further copies from the initial recording or distributing recorded shows to friends or others – would qualify as fair use. Nor did the Court rule, as one commenter suggests that recognizing ‘time shifting’ as fair use was based on First Amendment concerns. Thus, the suggestion that the *Sony* decision established a fair use ‘right’ for individuals to engage in a wide variety of reproduction and distribution activities is simply incorrect.”).

decide to waive rights in certain contexts, but the Commission may not adopt a redistribution control regime that forces content owners to cede rights as a condition of making programming available for free, over-the-air digital broadcast television.

### **III. THE SCOPE OF THE PERSONAL DIGITAL NETWORK ENVIRONMENT MUST BE CONSISTENT WITH COPYRIGHT OWNERS' RIGHTS.**

The Further Notice seeks comments on, *inter alia*, the “scope of redistribution that should be prevented” and, in particular, “on the usefulness of defining a personal digital network environment (‘PDNE’)”.<sup>14</sup> Professional and Collegiate Sports do not opine on the technical parameters of a permissible PDNE, other than to state the following: Many different mechanisms are available or under development that would circumscribe the redistribution of digital signals roughly consistent with a consumer’s local environment. Some such technologies limit geographic reach of redistribution; some are temporal, allowing use only within a certain time period after copying; some rely on affinity-based concepts to link certain devices to a particular individual.<sup>15</sup> The boundaries of a PDNE should not be set to foreclose innovative solutions that permit consumers to do what the law allows them to do: time-shift broadcast television programming for personal use. At the same time, as Congress has made clear and as the Commission has recognized, the Flag and the PDNE may not allow infringements on content owners’ rights. Whatever definition of a PDNE is adopted, by rule or otherwise, and whatever technologies are approved, the Commission must go no farther than copyright law permits.

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(footnote continued from previous page)

<sup>13</sup> See Professional and Collegiate Sports Comments at 15-17, Reply Comments at 7-11.

<sup>14</sup> Order at ¶ 63.

<sup>15</sup> Although we are aware of no such products in existence today, technology could be developed that enables a consumer securely to send a copy of digital content between two homes he owns through the Internet, and thus within the scope of existing law.

Respectfully submitted,

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Philip R. Hochberg  
Paul W. Jamieson  
Piper Rudnick LLP  
1200 19<sup>th</sup> Street N.W.  
Washington D.C. 20009  
202/861-3900

*Counsel for National Basketball Association,  
National Hockey League, National Football League,  
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Of Counsel:

Robert Alan Garrett  
Christopher Winters  
Arnold & Porter  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
202/942-5000  
*Counsel for the Office of the Commissioner of Baseball*

Thomas J. Ostertag  
Senior Vice President and General Counsel  
Office of the Commissioner of Baseball  
245 Park Avenue  
New York, NY 10167  
212/931-7800

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